

1990

Ashburn v. Ashburn : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Carolyn D. Zeuthen; Attorney for Appellant.

C. Gerald Parker; Park, Thornley & Crithlow; Attorney for Appellee.

Recommended Citation

Brief of Appellant, *Ashburn v. Ashburn*, No. 900386 (Utah Court of Appeals, 1990).

https://digitalcommons.law.byu.edu/byu_ca1/2762

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEAL
BRIEF

UTAH
DOCUMENT
K F U
50
.A10
DOCKET NO.

900386CA

IN THE UTAH COURT OF APPEALS

ALBERT PHAREZ ASHBURN,

Plaintiff/Respondent

VS.

MARIELA UYOMBE ASHBURN,

Defendant/Appellant

Case No: 900386 CA

Priority Classification: 16

BRIEF OF APPELLANT

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF WEBER , STATE OF UTAH,
HONORABLE STANTON M. TAYLOR, PRESIDING

C. Gerald Parker #2520
PARKER, THORNLEY & CRITCHLOW
Attorney for Plaintiff/Respondent
2610 Washington Blvd.
P. O. Box 107
Ogden, Utah 84402

Carolyn D. Zeuthen #5020
Attorney for Defendant/Appellant
2485 Grant Avenue, Suite 200
Ogden, Utah 84401

FILED

FEB 5 1991

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

ALBERT PHAREZ ASHBURN,	:	
	:	
Plaintiff/Respondent	:	
	:	
VS.	:	
	:	
MARIELA UYOMBE ASHBURN,	:	Case No: 900386 CA
	:	
Defendant/Appellant	:	Priority Classification: 16

MARIELA UYOMBE ASHBURN,
Defendant/Appellant

Priority Classification: 16

BRIEF OF APPELLANT

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF WEBER , STATE OF UTAH,
HONORABLE STANTON M. TAYLOR, PRESIDING

Carolyn D. Zeuthen #5020
Attorney for Defendant/Appellant
2485 Grant Avenue, Suite 200
Ogden, Utah 84401

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	1
STANDARD OF REVIEW	1-2
DETERMINATIVE STATUTES	2
STATEMENT OF THE CASE	2
Nature of the Case	2
Course of the Proceedings	2
Disposition at Trial Court	3
Statement of the Facts	3
SUMMARY OF THE ARGUMENT	8
ARGUMENT	9
POINT I The Trial Court Abused its Discretion in Awarding Only \$400.00 Per Month Alimony, and for Only Nine Months.	9
POINT 2 The Duration of an Alimony Award Should Not Depend Upon the Length of the Marriage	19
POINT 3 The Trial Court Abused its Discretion in Failing to Consider Appellant's Need for Medical insurance in Considering the Amount of the Alimony Award	21
CONCLUSION	22
ADDENDUM	23

TABLE OF AUTHORITIES

Cases Cited

	<u>PAGE</u>
<u>Anderson v. Anderson</u> 759 P.2d 476 (Utah App. 1988) . . . . .	.19
<u>Boyle v. Boyle</u> 735 P.2d 669 (Utah App. 1987) . . . . .	.13, 20
<u>Burt v. Burt</u> 799 P.2d 1166 (Utah App. 1990)	22
<u>Canning v. Canning</u> 774 P.2d 325 (Utah App. 1987) . . . . .	.14, 20
<u>English v. English</u> 565 P.2d 409 (Utah 1977)	16, 19
<u>Haumont v. Haumont</u> 793 P.2d 421 (Utah App. 1990) . . . . .	.10, 18, 20
<u>Higley v. Higley</u> 676 P.2d 379 (Utah 1983)	15, 20
<u>Noble v. Noble</u> 761 P.2d 1369 (Utah 1988) . . . . .	.12, 13, 20
<u>Olson v. Olson</u> 704 P.2d 564 (Utah 1985)	17, 20
<u>Rusham V. Rusham</u> 742 P.2d 123 (Utah 1987)	11
<u>Sampinos v. Sampinos</u> 750 P.2d 615 (Utah App. 1988) . . . . .	.16, 20
<u>Smith v. Smith</u> 793 P.2d 407 (Utah App. 1990)	2
<u>Walther v. Walther</u> 709 P.2d 87 (Utah 1985) . . . . .	.21

STATUTES CITED

Utah Code Annotated 30-3-5 (1) . . . . .	.2
Utah Code Annotated 30-3-5 (3)	19

IN THE UTAH COURT OF APPEALS

ALBERT PHAREZ ASHBURN,

Plaintiff/Respondent

VS.

MARIELA UYOMBE ASHBURN,

Defendant/Appellant

:
:
:
:
:
:
:
:
:
:
:
:

Case No: 900386 CA

Priority Classification: 16

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

Jurisdiction to hear this appeal is conferred upon this Court by Section 78-2a-3 (2) (h), Utah Code Annotated, as amended, which gives the Utah Court of Appeals appellate jurisdiction over appeals from district courts involving divorce, property division and support.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

STANDARD OF REVIEW

1. Did the Trial Court abuse its discretion in awarding Defendant alimony in the amount of only \$400 per month which was to terminate nine months later?

2. Should the duration of an alimony award depend upon the length of the marriage?

3. Did the Trial Court abuse its discretion in requiring Defendant to pay her own medical insurance premiums beginning August 1, 1990?

For all three issues, the standard of review is as follows:

The trial court's factual findings are presumed correct and, unless they are shown to be "clearly erroneous" under Utah Rules of Civil Procedure 52(a), they will not be set aside on appeal. Smith v. Smith, 793 P.2d 407, 409 (Utah App. 1990). However, a trial court's conclusions of law are examined for correctness and are accorded no special deference on review. Id.

DETERMINATIVE STATUTES

Section 30-3-5- (1), Utah Code Annotated, as amended:

When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, and parties . . .

Section 30-3-5- (3), Utah Code Annotated, as amended:

The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties,

STATEMENT OF THE CASE

1. Nature of the Case. This is an appeal from a final judgment of a decree of divorce and related relief, and specifically, from the adequacy of the alimony award.

2. Course of the Proceedings. Plaintiff filed a Complaint seeking a divorce from Defendant in Weber County District Court on April 19, 1989. Defendant filed an Answer on August 14, 1989, a Counterclaim on August 22, 1989 and issued a Request for Production of Documents. Plaintiff issued Interrogatories and Request for Production of Documents on August 18, 1989 and filed a Reply on August 25, 1990. A pre-trial was held on November 13, 1989. Defendant's counsel withdrew on November 24, 1989 after filing an Objection to the Commissioner's Recommendations. On November 27, 1990,

Defendant's new counsel filed an Objection to Pre-Trial Recommendations and the matter was set for trial on March 27, 1990 before the Honorable Stanton M. Taylor.

3. Disposition at Trial Court. The Decree of Divorce was entered on May 17, 1990 awarding Defendant \$400.00 per month alimony terminating on December 31, 1990 and medical insurance coverage through Plaintiff's employer, terminating on July 31, 1990.

4. Statement of Facts. The parties married in Las Vegas in September, 1985, after living together for approximately one year (Tr., at 73). No children were born of the six year relationship and Defendant obtained a Decree of Separate Maintenance on July 29, 1987, awarding her \$400.00 per month for three years and requiring Plaintiff to maintain her on his employer's health, accident, and dental insurance plan, pursuant to the provisions of the federal statute, COBRA (Tr., at 14, 23-27 & 120). However, the parties never separated, they remained together while Defendant pursued an education (Tr., at 22-23).

At the time of trial, Defendant was a 41 year old native of Equatorial Guinea, Africa, who first came to this country 27 years ago at the age of about 14 years (Tr., at 16 & 78). This was the third marriage for Defendant who has two grown children from her first marriage and has worked very little outside the home, the last time being approximately fifteen years ago (Tr., at 15, 75 & 81). Defendant has a fourth grade education in her native language, Spanish, is illiterate in English, and has a

very difficult time being understood when she speaks English (Tr., at 77-80).

Defendant has always been totally dependant on others for support: First married at age 14 and divorced 15 years later (Tr., at 95-96), she totally relied on her husbands for support, then her son after her second divorce (Tr., at 75-81). During her marriages, Defendant did not work because her husbands required her to stay at home (Tr., at 81). When she did briefly work, Defendant worked as a domestic and also as a mail opener (Tr., at 80-81).

Defendant has taught herself much of what she needs to know to get along by memorizing words and numbers and by learning how to take tests (Tr., at 80; Tr. Exhibit 2D). So far she has used her ability to memorize very well in progressing toward her goal of obtaining literacy in the English language by earning a high school diploma and taking a English language course at Weber State College (Tr., at 15 & 79). At Weber State College, Defendant, who spoke Pidgin English, could not keep up with the class (Tr., at 79). Plaintiff, a Computer Scientist, is well educated, having a Master's Degree from Hampton University (Tr., at 15 & 17).

Prior to her relationship with and marriage to Plaintiff, Defendant lived with her daughter in Utah, then her son in California in a condo given to them by Defendant's first husband (Tr., at 75). Three days before she married Plaintiff, Defendant quit-claimed her share of this condo to her son and daughter because Plaintiff did not want to be responsible for

payments (Tr., at 19, 83, 97-100). At that time, Defendant also owned a car, a lot in the California desert and personal clothing and jewelry (Tr., at 83,91-92).

Defendant entered into the marriage with Plaintiff on the basis of representations made by him which induced her to marry, namely that he would support her, care for her, and send her to school in the same way that her son was going to do (Tr., at 76). Even though she loved him, Defendant did not want to marry Plaintiff because she thought he would become ashamed of her because of her lack of education (Tr., at 75). She explained to Plaintiff that she had always wanted to go to school to gain something for herself because her first two husbands wanted her to be a housewife (Tr., at 75-76). Plaintiff, convincing her that he would take care of her desires and needs, traveled to California to bring her to Utah, stopping in Las Vegas to marry (Tr., at 43 & 76). While not exactly denying that he promised her these things - "I said to her . . . whatever she asked me to say," he does admit that he encouraged her to go to school (Tr., at 44).

During her relationship with Plaintiff, Defendant suffered emotional and physical turmoil. Six weeks after the marriage, Defendant discovered that the representations concerning the marriage would and could never be fulfilled because plaintiff admitted to her that he was a homosexual and that he had had a relationship with another man (Tr., at 77). Even though both parties have tested negatively for AIDS, defendant lives in fear that a later test will reveal that she has indeed contacted the

disease (Tr., at 54, & 89 -90). In addition, physical problems acquired during the marriage prevent her from employment similar to which she undertook fifteen years ago (Tr., at 81). She has injuries to her arm, head and chest as a result of physical abuse inflicted on her by Plaintiff which causes her much pain and a continuing need for medical care (Tr., at 49 & 81-82). Defendant has gone to the Women's Crises Center in Ogden for help (Tr., at 82) and subsequent counseling by a social worker employed by the State of Utah, Social Service Administration as a direct result of the physical abuse inflicted by Plaintiff (Tr., at 32 and 69-70). Even though Plaintiff has denied that he caused her injuries, he has admitted hitting her (Tr., at 32). Also, he has stated that another time, while they were arguing, she somehow "backed up and fell" when he turned around to face her (Tr., at 62). In addition to the physical abuse, Defendant endured the last of her four abortions during her relationship with Plaintiff, at his direction, one year before the trial, a further indication of the emotional turmoil she encountered (Tr., at 85 and 88).

At the time of trial, Plaintiff earned \$41,000 per year with an annual Civil Service Retirement benefit accumulating at the rate of \$1,800 - 2,000 per year (Tr., at 17, 56 and 58; Tr. Exhibit 3D). After considering the payments of support pursuant to the Decree of Separate Maintenance, the trial court granted defendant alimony in the amount of \$400.00 per month terminating on December 31, 1990, only nine months later (Tr., at 120; Decree of Divorce #4, R., at 60). The trial court also ordered

Plaintiff to maintain and to pay for Defendant's medical insurance coverage through July 31, 1990, when Defendant should be responsible for the payment of such coverage (Decree of Divorce #4, R., at 60). This order was entered despite Defendant's testimony that she had no medical insurance (Tr., at 55 and 88). The trial court awarded Plaintiff all the assets of the marriage including all of his retirement benefits, (Decree of Divorce, #6, R., at 60), and any equity which would have accumulated in the parties' home in Ogden during the six year relationship (Tr., at 120). While it is true that Plaintiff was ordered to pay the car payments for Defendant's car, (Decree of Divorce, #3, R., at 59-60), the record shows that the court intended this to be an offset against her share of his retirement (Tr. at 120-121). The trial court even awarded Defendant her property in California despite her testimony that she no longer had an interest in such property (Decree of Divorce, #2, R., at 59; Tr., at 91).

Defendant presently receives a total income of \$200 per month (Tr., at 92 and 93). Her son is no longer able or willing to support her or to pay for her schooling because he has other obligations (Tr., at 105 and 106). Defendant no longer owns the jewelry she had before the marriage because she sold it during the marriage (Tr., at 91). In the past Defendant has had to depend on friends for emotional and physical support and it is submitted that she continues to temporarily depend on these friends while resisting public assistance (Tr., at 105 - 107).

When looking at her history, it becomes apparent that Defendant never had the opportunity to develop the necessary marketable job skills and, even Plaintiff agrees, the only skills she is qualified to do involve physical labor or factory work (Tr., at 44 & 77-81). Defendant's inability to use the English language effectively to communicate is also a serious barrier. Further complicating the situation is the fact that Defendant is disabled due to injuries she received due to Plaintiff's abuse during the parties' marriage (Tr., at 49 , 63, 81-82, and 104). Defendant desires to attend school in order to obtain the necessary skills to become employable and independent (Tr., at 106-107). In order to do this she will continue to need support and medical coverage from Plaintiff.

SUMMARY OF THE ARGUMENT

1. The trial court abused its discretion in awarding Defendant alimony in the amount of only \$400.00 per month and for only nine months, in light of the following factors: (1) the financial condition and needs of the receiving spouse, (2) the ability of the receiving spouse to produce sufficient income for herself, and (3) the ability of the responding spouse to provide support. The trial court abused its discretion in this case by not considering all three of the above factors nor did it make adequate factual findings on material issues relating to the issue of alimony. Even if the trial court somehow considered the above three factors, the award of alimony is such a serious inequity that it becomes a clear abuse of discretion.

Factors considered are what physical or mental disabilities arising during the marriage, regardless of their cause, have increased the need for alimony or have reduced a spouse's ability to produce income. Courts consider whether a spouse can be returned to the status she had before marriage or if it is likely that she could become a public charge. If the record is inadequate, the case can be remanded back to the trial court for further factual findings on material issues.

2. The duration of an alimony award should not depend solely upon the length of the marriage but rather on what changes occurred in a party's economic situation during the marriage. The court should consider such factors as what economic adjustments were made which resulted in Defendant's dependence and whether she can be returned to the status she had before the marriage. Trial courts retain the ability to determine whether the alimony award has served its purpose.

3. The trial court abused its discretion in not considering Defendant's medical needs in awarding her alimony and by requiring Plaintiff to maintain and to pay for her medical insurance coverage only through July 31, 1990. It is important to consider the alimony award only after properly distributing the property interests to the respective parties.

ARGUMENT

POINT ONE: THE TRIAL COURT ABUSED ITS DISCRETION IN
AWARDING ONLY \$400.00 PER MONTH ALIMONY,
AND FOR ONLY NINE MONTHS.

A trial court's award of alimony is committed to the sound discretion of that court, and it will not be disturbed absent a

clear abuse of discretion. Haumont v. Haumont, 793 P.2d 421, 424 (Utah App. 1990). In setting an award of alimony, the trial court must consider three factors: (1) the financial condition and needs of the receiving spouse, (2) the ability of the receiving spouse to produce sufficient income for herself, and (3) the ability of the responding spouse to provide support. Id. The trial court is also required to make adequate factual findings on all material issues when considering these factors. Id. If the trial court considers the above described factors in setting an award of alimony, the award will not be disturbed absent a showing that such a serious inequity has resulted as to manifest a clear abuse of discretion. Id. If the trial court fails to consider the three factors or fails to make adequate factual findings on all material issues, the case will be remanded to the trial court for the proper considerations unless the facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment. Id.

Analyzed in light of the above requirements, the trial court abused its discretion in this case by not considering all three of the above factors and by not making adequate factual findings on material issues relating to the issue of alimony. Also, the relevant facts are unclear, controverted and do not support a finding in favor of the judgment. Even if this Court finds that the trial court somehow considered all of the above three factors and made the required findings on material issues, the award of alimony is such a serious inequity that it becomes a clear abuse of discretion.

1. The Financial Conditions and Needs of the Receiving Spouse.

Several Utah cases have addressed this first factor as an important function of an alimony award and have held that there must be adequate factual findings concerning the financial condition and needs of the receiving spouse. In Rusham V. Rusham, 742 P.2d 123, 126 (Utah 1987), the trial court failed to adequately address the financial needs of the receiving spouse. The Supreme Court held that the trial court made inadequate findings on the financial needs of the wife and abused its discretion in awarding her only \$600 per month alimony when nothing in the record delineated her financial needs despite her monthly expenses of \$1,521.50. Id. The trial court found that the wife was capable of earning \$200.00 per month while her husband's earnings were found to be \$5,850.00. The Supreme Court held that, while equalization of income was not necessarily the requirement, there must be some clear rationale for the level of alimony consistent with the stated criteria. Id. at 126.

There are no factual findings concerning the financial condition and needs of Mrs. Ashburn in the present case - only that she has "tremendous need" (Tr., at 120). As in Rusham, the trial court here denied extended alimony based upon the short term of the marriage in spite of her "tremendous need." There is no evidence in the record that the court's rationale for awarding her \$400.00 per month for only nine months was consistent with her financial needs as mandated by Rusham. The evidence in the record, in fact, strongly suggests the contrary.

Defendant now receives a total of \$200.00 per month income. (Tr., at 93). While no evidence was presented at trial on her expenses, it is obvious she will have difficulty supporting herself. The fact she remained living with Plaintiff after going to the trouble of obtaining a Decree of Separate Maintenance is proof of that (Tr., at 23).

In Noble v. Noble, 761 P.2d 1369 (Utah 1988), the Utah Supreme Court upheld a permanent alimony award of \$750.00 per month to help meet the needs of the wife despite the fact that the parties' marriage was only three years in duration. The court, in examining the financial condition and needs of the wife, found that the disabilities Defendant suffered as a result of her injuries at Plaintiff's hand should be an important consideration in assessing the first two of the three factors. The court also found that the wife may have suffered permanent injuries that left her unemployable or unable to work at her past level of experience and held that it was appropriate for the trial court to take into account whether physical or mental disabilities arising during the marriage, regardless of their cause, have made the receiving party's needs greater or reduced that party's ability to produce an income. Noble at 1372. The facts in the Noble case involved the extreme case where the husband attempted to murder his wife and to commit suicide and failed in both. However, the significance and importance of the court's holding is that the duration of a marriage should not be considered at all when the receiving party's ability to earn a living has been reduced during the marriage, for whatever

reason. Defendant has testified that her ability to handle work requiring physical labor has been greatly impaired due to the injuries in her her arm, elbow, head and chest (Tr., at 81-82). Plaintiff even agrees that she has these injuries and that she has sought medical help (Tr., at 49). Defendant has also testified that she has sought medical help for these injuries but there are no findings by the trial court that she is disabled, that she is illiterate, or that she, in fact, could work. The relevant facts concerning her disability are either lacking completely or they are unclear and controverted and they do not support a finding in favor of the judgment.

Boyle v. Boyle, 735 P.2d 669, 671 (Utah App. 1987), addresses the issue of alimony in a second marriage. The trial court awarded no alimony after a seven-year marriage and the Court of Appeals affirmed its decision because the decree entered by the trial court restored each party to the condition which existed at the time of the marriage. Id. at 671. The Court, looking at the issue of whether the trial court's award can place a spouse back into the position occupied prior to the marriage, held that the wife could support herself. This was found impossible in Noble.

In the present case, Defendant cannot be returned to the position occupied prior to the marriage. Defendant is disabled due to the injuries she sustained during the marriage. While the evidence regarding her disability is controverted, a review of the testimony of both parties leaves no doubt that she sustained injuries during the marriage and was in a better position before

marriage then she is in now. Before marrying Plaintiff, she had the support from her son and his intention to educate her, but she no longer can depend upon this support (Tr., at 105-106). In addition, Defendant owned land in the California Mojave desert and an interest in a condominium in California which she does not have now (Tr., at 90-91). Even though Defendant was awarded her car and her personal clothing (Tr., at 91), she has suffered economic losses. Because her car was destroyed by Plaintiff in an accident, (Tr., at 83-84), the court, by requiring Plaintiff to make payments on a new one, simply restored her separate property to her. But she paid dearly for this for the court considered the car payments an offset against Plaintiff's retirement. Even though Defendant was not working when she married Plaintiff, nor did she work during the marriage, Plaintiff knew of her background, her lack of ability to communicate and her illiteracy (Tr., at 73-74). But he convinced her to marry him, anyway, with Defendant believing that he would educate her and care for her.

2. The Ability of the Wife to Produce a Sufficient Income for Herself.

The trial court in the present case made no findings on Mrs. Ashburn's ability to produce a sufficient income to support herself, nor do the relevant facts support such a finding.

The Utah Court of Appeals has held that the denial of alimony was a clear abuse of discretion where the record does not reveal that the court considered or made any finding of the wife's current or future ability to work. Canning v. Canning,

744 P.2d 325, 326 (Utah App. 1987). In Canning, the Court held that the decree, while appearing to contemplate that the wife would obtain work and earn income sufficient to support herself and the parties' children, there were no specific factual findings to that effect. Id. at 327. Without specific factual findings, she would be left without a baseline for future modification purposes if she does not in fact obtain ongoing, income-producing work. Id.

In Higley v. Higley, 676 P. 2d 379 (Utah 1983), the Court examined the economic situation facing the parties, particularly women emerging from a marriage who earn approximately 60 percent of what men earn. Because the trial court made no findings regarding the receiving spouses' ability to work in the present as well as in the future and, because of health problems that appeared to greatly restrict her ability to work, the Supreme Court held that an award of \$100 per month permanent alimony was a clear and prejudicial abuse of discretion. Higley at 381. The appellant in Higley was a 47 year old woman with a high school education who was in poor health and who had spent most of the last 30 years of her life as a full-time homemaker and caretaker of her children. Id. at 381. The court found that Appellant could well be forced to resort to public assistance as the trial court's award of \$100 per month alimony fell far short of serving her needs.

Likewise, in the instant case, Defendant has spent nearly all of her life as a full-time homemaker and caretaker of her children at the consent and requirement of her husbands. She

only worked for a short time and is now left with only \$200.00 per month income, an inability to communicate in the English language, and with a physical disability. This could force her to seek public assistance as her income falls far short of meeting her needs. Defendant cannot be expected to rely on any assets acquired during the marriage because she has none of these, not even a fair share of Plaintiff's retirement.

Courts have awarded alimony when it was found that the wife could be forced to seek public assistance. In English v. English, 565 P.2d 409, 411 (Utah 1977), the Supreme Court held that the most important function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during the marriage, and to prevent her from becoming a public charge. The trial court observed in Sampinos v. Sampinos, 750 P.2d 615, 619 (Utah App. 1988): ". . . The trial court's allocation of alimony was an attempt to keep plaintiff from becoming a public charge and to realign the disparity between the defendant's and plaintiff's standards of living." In Sampinos, the Court of Appeals held that alimony should be paid based on the needs of the wife and her ability to produce income for herself.

Thus, the alimony award of \$400.00 per month, in the present case, constituted an abuse of discretion. It was inequitable and unfair, also, as to its short duration. There were no specific factual findings as to whether Defendant could or would obtain work and earn income sufficient to support herself or if she could become a public charge. The evidence

shows that she did not work prior to the marriage or during the marriage because Plaintiff did not want, nor expected her to work. There was no evidence presented that Defendant would have a job when the alimony terminated or that she could be self-supporting at that time only, apparently, the trial court's assumption. As noted in Olson v. Olson, 704 P.2d 564, 567. (Utah 1985):

. . . Having worked only minor clerical jobs for two brief periods over twenty years apart she has no reasonable expectation of obtaining employment two years hence that will enable her to support herself at a standard of living even approaching that which she had during the marriage. Continuing spousal maintenance is mandated by these circumstances . . . should the circumstances change in the future, the defendant may petition the court to modify the decree under its continuing jurisdiction.

3. The Ability of the Husband to Provide Support. The trial court recognized that Plaintiff has the ability to pay alimony. Plaintiff has a yearly income of \$41,000 in addition to retirement and savings. Plaintiff offered no evidence of his monthly expenses except the car payments (Tr., at 20). Further, Plaintiff offered no evidence of the effect on his standard of living of his paying \$400.00 per month to Defendant. Thus, the trial court failed to adequately consider this third factor in its award of alimony.

If the Record is adequate, this Court can modify the Decree of Divorce or, if the record is not adequate, remand the case back to the trial court for further findings and a resetting of the alimony award based upon the required findings. Haumont, supra. In Haumont, the Court of Appeals found that there was substantial converted evidence as to the required three factors which did not lend itself to a finding only in favor of the judgment. Id.

A review of the record in the present case suggests that the trial court clearly abused its discretion by not making adequate factual findings on material issues relating to appellant's need for continuing support. Also, the relevant facts are unclear and controverted and do not support the judgment which result in a serious inequity. It is submitted that much of this problem had to do with Defendant's lack of ability to communicate to the court and to her counsel. Defendant's desperate attempt to submit relevant evidence to the court for reconsideration can be seen in her post trial filings as recorded in the Index to the Record.

It is also important to consider that Plaintiff told Defendant he would provide for her, never asked her to get a job during their marriage and completely supported her even after the Decree of Separate Maintenance was in effect. Defendant took Plaintiff at his word, that he would provide adequate support for her while she went to school. It is submitted that the trial court ignored the real dynamics of the parties' relationship, to-wit: that Plaintiff, by his actions, lulled

Defendant into a false sense of security and then, when he filed for the divorce before she had a chance to complete her education, he pulled the rug out from under her.

POINT TWO: THE DURATION OF AN ALIMONY AWARD SHOULD
NOT DEPEND UPON THE LENGTH OF THE MARRIAGE

In English v. English, supra, the findings of the trial court as to its award of \$2,000 per month alimony, as well as \$500 child support, was based upon the parties' twenty year marriage and joint financial contributions. The Utah Supreme Court held that basing an award of alimony on the length of the marriage as well as the financial contributions was not an appropriate measure to determine alimony. Id. Likewise, in the present case, the trial court clearly denied Mrs. Ashburn extended alimony due to the length of the marriage despite her tremendous need for it.

The trial court retains continuing jurisdiction in order to terminate alimony under the provisions of Section 30-3--5 (3) of the Utah Code which provides in part:

The Court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties . . . as is reasonable and necessary.

In Anderson v. Anderson, 759 P.2d 476, 478 (Utah App. 1988), the Utah Court of Appeals held that it was not appropriate to have alimony terminate on completion of education or attainment of full-time employment but the matter should be returned to the trial court to reconsider the alimony award in

light of the completed education or full-time employment commensurate to the three factors. (See Haumont, supra.)

Thus, trial courts retain the ability to determine whether or not the alimony award has served its purpose. If the award is rehabilitative in nature, it can be brought back to the Court for further review in appropriate circumstances.

Lest Plaintiff point out that in many previous Utah appellate decisions awarding permanent alimony such as Higley v. Higley, supra; Olson v. Olson, supra; and Canning v. Canning, supra; the marriages were of eighteen years duration or longer, Defendant notes this Court's approval of permanent alimony awards in short term marriages: Noble v. Noble, supra, (permanent alimony award after a three year marriage); Haumont v. Haumont, supra, (separation less than three years after marriage, permanent alimony award given); Sampinos v. Sampinos, supra, (Permanent alimony award after an eleven year marriage where the parties had separated four times for a total period of more than four years). Even though in Boyle, supra, at 671, the Court held that consideration of the three factors does not preclude considering factors such as the length of the marriage in awarding alimony, the Boyle case can be distinguished from the present one by its facts. In Boyle, the trial court properly considered the three necessary factors and the material facts clearly supported the evidence where the wife was awarded most of the marital estate as well as the residue of her premarital assets. Boyle, supra, at 671. Also, it was found

that the wife was able to continue to work as she had done prior to the marriage. Id. at 672.

In the present case, Defendant was awarded no assets of the marriage, she had lost pre-marital assets, she did not work prior to the marriage and her disability prevents her from working at her only level of experience. Also, the trial court found that the marriage was over at the time of the Separate Maintenance Decree and, therefore, it took into account the amount paid to her under this Decree in awarding alimony even though the parties were living together during that time. This resulted in a serious inequity and is an abuse of discretion.

POINT THREE: THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER APPELLANT'S NEED FOR MEDICAL INSURANCE IN CONSIDERING THE ALIMONY AWARD.

Injuries and attendant medical expenses may be considered in determining an appropriate alimony award. In Walther v. Walther, 709 P.2d 387, 388 (Utah 1985), the Supreme Court held that the trial court's award of \$5,000 for pain, suffering, and future medical expenses caused by the physical abuse of the wife's husband could be considered in awarding alimony. Id.

In the present case, there was no finding by the trial court that Defendant could pay for her medical needs or for insurance coverage nor did the award of alimony allow for these needs. There was only Defendant's testimony that she had incurred medical expenses and will have future medical expenses.

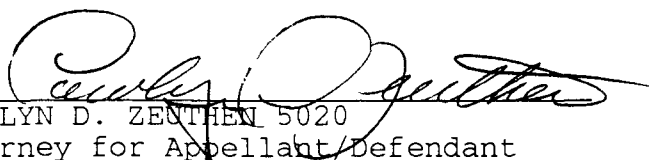
It is appropriate for the trial court to consider the amount of alimony only after it properly distributes property

interests to the respective parties. Burt v. Burt, 799 P.2d 1166, N.3 (Utah App. 1990). In the present case, the trial court considered the amount paid to Defendant under the Decree of Separate Maintenance in awarding the marital assets even though the marriage was intact during that time. It also considered the amount of the car payment of \$237.73 per month until November, 1992 to be an offset against Plaintiff's retirement even though it was Plaintiff that wrecked the car (Tr., at 120-121). For these reasons the resulting award was such a serious inequity that it is a clear abuse of discretion.

CONCLUSION

For the reasons set forth herein, Defendant respectfully prays that this Court modify the amount and duration of the alimony award to permanent alimony, as argued above, and award Defendant attorney fees incurred on this appeal.

RESPECTFULLY submitted this 1st day of February, 1991.


CAROLYN D. ZEUTHEN 5020
Attorney for Appellant/Defendant
2485 Grant Avenue, Suite 200
Ogden, Utah 84401

CERTIFICATE OF HAND DELIVERY

I hereby certify that I delivered by hand four true and correct copies of the foregoing Brief of Appellant,, on this ^{4th}~~first~~ day of February, 1991 to: C. Gerald Parker, Attorney for Defendant, 2610 Washington Blvd., Ogden, Utah.


CAROLYN D. ZEUTHEN

ADDENDUM

30-3-5. Disposition of property — Maintenance and health care of parties and children — Court to have continuing jurisdiction — Custody and visitation — Termination of alimony — Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, and parties. The court shall include the following in every decree of divorce:

- (a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children; and
- (b) if coverage is available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the non-custodial parent to provide the day care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property as is reasonable and necessary.

(4) In determining visitation rights of parents, grandparents, and other relatives, the court shall consider the welfare of the child.

(5) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(6) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.

(7) When a petition for modification of child custody or visitation provisions of a court order is made and denied, the court may order the petitioner to pay the reasonable attorney's fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted in good faith.

History: R.S. 1898 & C.L. 1907, § 1212; L. 1909, ch. 109, § 4; C.L. 1917, § 3000; R.S. 1933 & C. 1943, 40-3-5; L. 1969, ch. 72, § 3; 1975, ch. 81, § 1; 1979, ch. 110, § 1; 1984, ch. 13, § 1; 1985, ch. 72, § 1; 1985, ch. 100, § 1.

Amendment Notes. — The 1985 amendment by Chapter 72 rewrote Subsection (1);

added Subsection (2); designated two undesignated paragraphs as Subsections (3) and (4); inserted "In determining" and "the court" in Subsection (4); redesignated former Subsections (2) and (3) as Subsections (5) and (6); divided Subsection (5) into two sentences, substituting "However, if the remarriage" for "unless

Recorded Book 151
Page 1503
Indexed 10

MAY 1 2 32 PM '90

C. Gerald Parker, #2520
PARKER, THORNLEY & CRITCHLOW
Attorneys for Plaintiff
2610 Washington Blvd.
P. O. Box 107
Ogden, Utah 84402
Telephone: 399-3303

IN THE DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

ALBERT PHAREZ ASHBURN,
826 North Liberty Avenue
Ogden, Utah 84404
SS No. 223-78-4987

Plaintiff,

VS .

MARIELA UYOMBE ASHBURN,
Post Office Box 5128
Carson, California 90749
SS No. 331-36-6900

Defendant.

JUDGMENT AND DECREE
OF DIVORCE

Civil No. 890902015DA

Judge: Stanton M. Taylor

MAY 9 1990

The above-entitled action came on regularly for trial on the 27th day of March, 1990, before the Honorable Stanton M. Taylor, one of the Judges of the above-entitled Court sitting without a jury. The plaintiff appeared in person and was represented by his counsel, C. Gerald Parker, and the defendant appeared in person and was represented by her counsel, Phillip D. Judd. The Court heard the evidence introduced on behalf of both

Recorded Book	1504
Page	.....
Indexed	.....

plaintiff and defendant, and entered its Findings of Fact and Conclusions of Law, pursuant to which a decree is to be entered; now by virtue of the law and premises, in accordance with the facts found and conclusions of law aforesaid, it is hereby

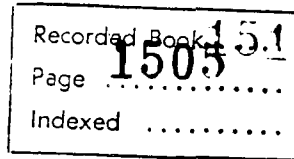
ORDERED, ADJUDGED AND DECREED:

1. That the bonds of matrimony now and heretofore existing between the plaintiff and defendant be, and they are hereby, dissolved and the parties be, and they are hereby, restored to the status of unmarried persons on the date the divorce decree is signed by the Court and entered by the Clerk in the Register of Actions.

2. That each of the parties is hereby awarded the assets he or she owned prior to the marriage, free and clear of any claim by the other. Pursuant to this provision, plaintiff is therefore awarded his home in Ogden, Utah, and defendant is awarded her real estate situated in the State of California. Plaintiff's home in Ogden, Utah now stands of record in the names of ALBERT P. ASHBURN and MARIELA U. ASHBURN and the legal description thereof is as follows:

All of Lot 248, RON-CLARE VILLAGE NO. 3, Ogden City, Weber County, Utah.

3. That each of the parties is hereby awarded the assets now in his or her possession. Pursuant to this provision, defendant is awarded the 1987 Honda Accord automobile and in



accordance with plaintiff's stated willingness to pay for this vehicle, he is ordered to pay the balance owing thereon. Plaintiff also is ordered to pay the taxes and insurance on said vehicle until the balance owing on said vehicle has been paid in full, at which time he shall no longer be responsible to pay the taxes and insurance thereon.

4. That plaintiff is hereby ordered to continue to pay the property settlement of \$400.00 per month set forth in the Separate Maintenance Decree through the month of July, 1990 and commencing with the month of August, 1990, plaintiff is hereby ordered to pay to defendant the sum of \$400.00 per month as and for alimony, to continue through December 31, 1990, at which time said alimony shall terminate.

5. That through the month of July, 1990, defendant shall have the right to maintain medical insurance coverage through plaintiff's insurer, pursuant to the provisions of the federal COBRA statute, with plaintiff to pay the premiums thereon for that period. Should defendant elect to extend the said COBRA coverage beyond July 31, 1990, she shall be responsible to pay all of the premiums from that point forward.

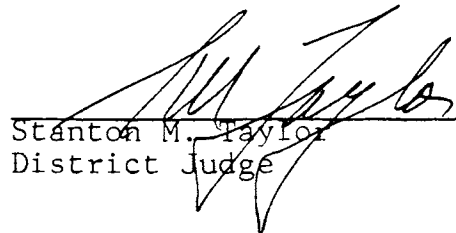
6. That plaintiff is hereby awarded all of his retirement benefits and defendant is hereby awarded the \$200.00 per month retirement benefits she is receiving, pursuant to a former marriage.

Recorded Book	151
Page	1506
Indexed	.....

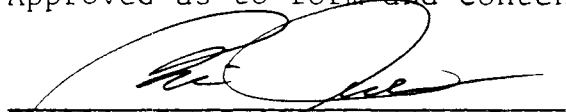
7. That defendant is hereby awarded judgment against plaintiff for attorney's fees in the sum of \$600.00.

8. That defendant is hereby restored to her former surname of MUNSON.

DATED this 4 day of ^{May}~~April~~, 1990.


Stanton M. Taylor
District Judge

Approved as to form and content:


Phillip D. Judd
Attorney for Defendant

MAY 1 2 32 PM '90

C. Gerald Parker, #2520
PARKER, THORNLEY & CRITCHLOW
Attorneys for Plaintiff
2610 Washington Blvd.
P. O. Box 107
Ogden, Utah 84402
Telephone: 399-3303

IN THE DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

ALBERT PHAREZ ASHBURN,)	
)	
Plaintiff,	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
vs.)	
	)	Civil No. 890902015DA
MARIELA UYOMBE ASHBURN,)	
	)	Judge: Stanton M. Taylor
Defendant.)	

MAY 9 1990

The above-entitled action came on regularly for trial on the 27th day of March, 1990, before the Honorable Stanton M. Taylor, one of the Judges of the above-entitled Court sitting without a jury; the plaintiff appeared in person and was represented by his counsel, C. Gerald Parker, and the defendant appeared in person and was represented by her counsel, Phillip D. Judd. The Court heard the evidence introduced on behalf of both plaintiff and defendant, and after being fully advised in the premises, now makes the following:

FINDINGS OF FACT

1. That plaintiff is a bona fide and actual resident of Weber County, Utah, and has been for more than three months immediately prior to the commencement of this action.

2. That plaintiff and defendant were married to each other at Las Vegas, Nevada, on September 14, 1985, and ever since said time have been and now are husband and wife.

3. That no children have been born of this marriage and none are expected. Defendant has two adult children by a prior marriage.

4. That on July 29, 1987, a Decree of Separate Maintenance was granted between the parties by the above-entitled Court under Case No. 99795, which decree provided inter alia for disposition of assets of the parties, the maintenance of medical insurance, and the awarding to defendant of the sum of \$400.00 per month as a property settlement to continue for a period of three years, commencing with the month of August, 1987.

5. That the parties have irreconcilable differences making further marital relationship impossible.

6. That the parties have acquired assets, including the following:

(a) A home which plaintiff owned prior to the marriage located at 826 North Liberty Avenue, Ogden, Utah.

During the marriage, defendant's name was added to the property and the home now stands of record in the names of Albert P. and Mariela U. Ashburn. The legal description of said home is as follows:

All of Lot 248, RON-CLARE VILLAGE NO. 3, Ogden City, Weber County, Utah.

(b) Certain real property owned by defendant situated in the State of California.

(c) A 1987 Honda Accord automobile.

(d) Household furniture, furnishings and effects.

(e) Retirement benefits accrued by defendant through his employment at Hill Air Force Base and a retirement benefit in the sum of \$200.00 per month which defendant receives pursuant to a prior marriage.

(f) Personal effects.

7. That plaintiff is employed at Hill Air Force Base with an income of approximately \$41,000.00 per year gross and a net income of approximately \$2,200.00 per month.

8. That defendant was not employed at the time of her marriage to plaintiff and she has not been employed since that time.

9. That each of the parties have been

LAW OFFICES OF
PARKER, THORNLEY & CRITCHLOW
2610 WASHINGTON BOULEVARD
P. O. BOX 107
OGDEN, UTAH 84402

represented by legal counsel in these proceedings and each has incurred attorney's fees herein.

10. That prior to this marriage, defendant was known by the surname of MUNSON, by which surname she desires to be known in the future.

From the foregoing Findings of Fact, the Court arrives at the following:

CONCLUSIONS OF LAW

1. That plaintiff is entitled to a Decree of Divorce from the defendant, the same to become final on the date the divorce decree is signed by the Court and entered by the Clerk in the Register of Actions.

2. That each of the parties is hereby awarded the assets he or she owned prior to the marriage, free and clear of any claim by the other. Pursuant to this provision, plaintiff is therefore awarded his home in Ogden, Utah, and defendant is awarded her real estate situated in the State of California.

3. That each of the parties be awarded the assets now in his or her possession. Pursuant to this provision, defendant is awarded the 1987 Honda Accord automobile and in accordance with plaintiff's stated willingness to pay for this vehicle, he is ordered to pay the balance owing thereon. Plaintiff also is ordered to pay the taxes and insurance on said vehicle until the

balance owing on said vehicle has been paid in full, at which time he shall no longer be responsible to pay the taxes and insurance thereon.

4. That plaintiff be required to continue to pay the property settlement of \$400.00 per month set forth in the previously referenced Separate Maintenance Decree through the month of July, 1990 and commencing with the month of August, 1990, plaintiff shall be required to pay to defendant the sum of \$400.00 per month as and for alimony, to continue through December 31, 1990, at which time said alimony shall terminate.

5. That through the month of July, 1990, defendant shall have the right to maintain medical insurance coverage through plaintiff's insurer, pursuant to the provisions of the federal COBRA statute, with plaintiff to pay the premiums thereon for that period. Should defendant elect to extend the said COBRA coverage beyond July 31, 1990, she shall be responsible to pay all of the premiums from that point forward.

6. That plaintiff be awarded all of his retirement benefits and defendant be awarded the \$200.00 per month retirement benefits she is receiving, pursuant to a former marriage.

7. That defendant be awarded the sum of \$600.00 toward her attorney's fees in lieu of the \$400.00 previously recommended by the Court Commissioner and judgment should be awarded to

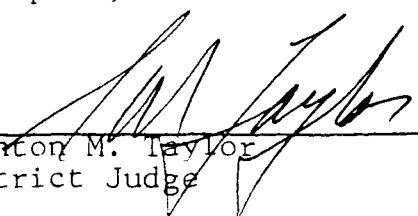
LAW OFFICES OF
PARKER, THORNLEY & CRITCHLOW
2810 WASHINGTON BOULEVARD
P.O. BOX 107
OGDEN, UTAH 84402

defendant for said attorney's fees.

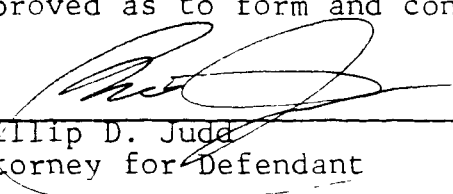
8. That defendant be restored to her former surname of
MUNSON.

Let judgment be entered accordingly.

DATED this 4 day of ^{MAY}~~April~~, 1990.


Stanton M. Taylor
District Judge

Approved as to form and content:


Phillip D. Judd
Attorney for Defendant